

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
APPELLATE SIDE  
SECOND APPEAL NO.239 OF 1991

Krishna Subarao Suryavanshi  
since deceased through his Legal  
Heirs:

A. Smt.Sharada Krishna Suryavanshi  
wife of the deceased appellant,  
age 58 yrs.

B. Ravindra Krishna Suryavanshi  
son of the deceased appellant,  
age 40 yrs.

C. Sou. Sunanda Dattatraya Dodagade,  
daughter of the deceased appellant,  
age 39 yrs., residing at Jakharwadi,  
Post Mumewadi, Tal.Gadhinglaj,  
Dist. Kolhapur.

D. Rajendrakumar Krishna Suryavanshi,  
son the deceased appellant,  
age 38 yrs.

E. Sou. Sushma Arun Lokhande,  
Daughter of the deceased appellant  
age 35 yrs.

A, B, D and E Residing at Post  
Nesari, Tal.Gadhinglaj,  
Dist. Kolhapur.

Appellants

Vs.

1. Shivaji Subhana Nandavadekar  
(Died on 05/11/1998)

2. Tanaji Subhana Nandavadekar

3. Sambhaji Subhana Nandavadekar

4. Krishna Subhana Nandavadekar  
(Died on 28/12/2002)

5. Ramchandra Subhana Nandavadekar  
(Appeal dismissed against him  
on 20/8/1992).

6. Krishna Dattu Redekar

All residents of Sawantwadi,  
Hamlet of Nesari, Tal. Gadhinglaj,  
Dist. Kolhapur.

Respondents

Mr.S.M.Kamble h/f. Mr.Ashok P. Mundargi for  
applicants.

Mr.V.S.Kapse h/f Mr.S.L.Kapse for Resp.Nos.1 to 4.

Respondent no.6 absent, though served.

CORAM: B.H.MARLAPALLE,J.

December 15, 2005.

ORAL JUDGMENT:

1. While admitting the appeal on 29-4-1991 this  
Court framed the following substantial questions of  
law for consideration:

(a) Whether the lower Appellate Court was  
justified in giving the declaration that the  
sale deed was not binding on the plaintiffs,  
without there being any cross-objections or  
cross-appeal against the trial Court's  
judgment and decree by the original  
plaintiffs?

(b) Whether the transaction in question could

be held as not binding on the plaintiffs as it was not entered into for legal necessity of the joint family by the Manager of the Hindu Joint Family? And

(c) Whether the Sale Deed dated 4/7/1979 executed by the defendant no.2 in favour of the appellant is binding on the plaintiffs, who happen to be the brothers of the defendant no.2?

2. The present Respondent Nos.1 to 4 had instituted RCS No.59 of 1981 and impleaded the present appellant as defendant no.1, respondent no.5 as defendant no.2 and respondent no.6 as defendant no.3. The plaintiffs and defendant no.2 are inter se brothers and the plaintiffs claim that the defendant no.1 was obstructing their possession over the suit land viz. the piece of land admeasuring 8 Rs. out of the total holding of 13 Rs. located in Gat No.718 of village Nesari, Taluka Gadhinglaj and bounded by the other properties as set out in para 1 of the plaint. As per the plaintiffs the defendant no.1 claimed that he had purchased the suit land from the defendant no.2 by an unregistered Sale Deed dated

4/7/1979 for a total consideration of Rs.99/- and he was put in possession. They claimed that the defendant no.2 had not entered into any legal transaction with defendant no.1 and in any case the defendant no.2 had no authority in law, though he was the eldest brother, to dispose of the ancestral property unless there was any financial need of the joint family. The plaintiffs, therefore, prayed for an injunction against the defendant no.1 from disturbing their possession over the suit land and also prayed for a declaration that the transaction, if any, that had taken place between defendant nos.1 and 2 be declared as illegal, void ab initio and not binding on them.

. The defendant nos.2 and 3 did not take any steps to contest the suit but defendant no.1 i.e. the present appellant filed a suit to the injunction application and subsequently adopted the same as the Written Statement. As per the defendant no.1, the defendant no.2 was the Manager of the Joint Hindu Family and he sold the suit land for the financial necessity of the family. Plaintiff no.2 had stepped in the witness box as PW 1 on behalf of the plaintiffs and the defendant no.1 examined himself as

well as one Vyankatesh Kulkarni as DW 2. He had scribed the Sale Deed at Exhibit 58. The trial Court considered the evidence of the respective parties and held that the plaintiffs were the lawful owners of the suit property along with the defendant no.2 on the date of the suit and the plaintiffs were entitled for possession of the suit property but were not entitled for relief of injunction. The plaintiffs' alternative prayer for partition and possession of 4/5th share of the suit land was allowed by the trial Court vide its decree dated 30/10/1985. The plaintiffs were to recover the possession of the 4/5th share of the suit land from the defendant no.1. The Defendant No.1, therefore, filed Regular Civil Appeal No.411 of 1985 which came to be dismissed by the learned Additional District Judge, Kolhapur vide his judgment and order dated 16th June 1990. The lower Appellate Court proceeded to modify the decree passed by the trial Court as under:

"The suit of the plaintiffs as regards injunction is dismissed. But, it is declared that the sale deed dated 4.7.79 executed by defendant no.2 in favour of the defendant no.1 is not binding on the shares of the

plaintiffs.

The plaintiffs are entitled to 4/5th share in suit land. The plaintiffs do recover possession of 4/5th portion of suit land from the defendant no.1. The precepts be sent to Collector, Kolhapur under Section 54 of C.P.C. read with Order XXI Rule 35 of C.P.C. to partition the suit property and to put the plaintiffs in possession of 4/5th share.

Under the circumstances, parties are directed to bear their own costs.

Decree be drawn up accordingly."

3. At the threshold the learned counsel for the appellant submits that in the absence of a cross objection / appeal filed by the original plaintiffs, there was no occasion for the lower Appellate Court to modify the decree so as to grant the relief of declaration to the effect that the Sale Deed dated 4/7/1979 executed by defendant no.2 in favour of defendant no.1 is not binding on the shares of the plaintiffs. He further submitted that the sale

transaction at Exhibit 58 was bona fide, genuine and for the financial requirements of the joint family of defendant no.2, who was the eldest brother of the plaintiffs and was the manager of the family. It was further submitted that the Sale Deed was signed on 4/7/1979 but the suit came to be filed as late as on 9/6/1981 and, therefore, as per the learned counsel for the appellant a presumption is required to be drawn that the plaintiffs were aware of the sale of suit land by the defendant no.2 in favour of defendant no.1 and it being a bona fide and genuine transaction they kept mum.

3A. In the plaint at Exhibit 1 the plaintiffs had claimed that the cause of action had arisen on 1/6/1981 when the defendant no.1 caused obstruction to their possession of the suit land. They had also stated that the sale transaction of the suit land between defendant no.2 and defendant no.1 was not legal and it was not for the bona fide requirements of the joint family. The defendant no.2 did not contest the suit nor was he brought as a witness by the defendant no.1 so as to prove that the suit land was sold to him by the defendant no.2 for the bona fide requirements of the joint family. The recital of the sale deed at Exhibit 58 is totally silent on

such requirements of the family. In fact the sale deed goes to recite the suit land as the exclusive property of defendant no.2 and he sold the same for the consideration of Rs.99/- to the defendant no.1. It does not state or acknowledge that the suit land was the ancestral property of the plaintiffs and defendant no.2, in addition to the fact that the document at Exhibit 58 is not a registered document. Thus there was absolutely no evidence in support of the contentions of the defendant no.1 that the transaction at Exhibit 58 was for the requirements of the joint family leave alone the bona fide requirements. On the other hand the testimony of PW 1 goes to show that the suit land was an ancestral property of the plaintiffs and defendant no.2, who was the eldest brother. As per him the joint family possessed about 25 to 30 acres of land and the suit property is situated in Gaothan and it could fetch the price of Rs.2000/- per guntha. He also stated that none of the plaintiffs had consented to or agreed for or authorised the defendant no.2 to transfer the suit land in favour of defendant no.1 or any other person for the requirement of the family necessities. He also pointed out that the defendant no.2 was the eldest brother and all the property of

the family stood in his name as the Karta of the joint family. He was also elected as the member of the Village Panchayat and was addicted to liquor. The plaintiffs were demanding the partition of the property and specifically stated that the defendant no.2 was not looking after the joint family property as a Karta. The trial Court on assessment of this evidence rightly held that the plaintiffs were entitled for the possession of their share from the suit property i.e. 4/5th share. However, it failed to notice that the suit property admeasured 8 Rs. and the 4/5th share of the plaintiffs could not be bifurcated unless the sale transaction was held to be not binding on the plaintiffs. The lower Appellate Court rightly stepped in and corrected the same by holding that the Sale Deed at Exhibit 58 was not binding on the plaintiffs. On execution of the decree the defendant no.1 may remain in possession of the balance 1/5th share of the suit land and in any case it would be an issue between the defendant no.1 and defendant no.2. It was not necessary for the lower Appellate Court to correct the decree only if there was a cross appeal / objection by the plaintiffs. In respect of the second and third substantial questions of law, both the Courts below have recorded concurrent findings. On perusal of the

unregistered Sale Deed at Exhibit 58 and having  
 considered the contents therein and the record, there  
 is no reason even to doubt that the said concurrent  
 findings suffer from any errors.

4. In the premises this appeal fails and the same  
 is hereby dismissed. The decree modified by the  
 lower Appellate Court is hereby confirmed. Parties  
 to bear their own costs.

(B.H.MARLAPALLE,J.)